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IN THE

Supreme Court of the United States

October Term, 1966
No. 1340

SUNKIST GROWERS, INC.,

Petitioner,

vs.

CASE-SWAYNE CO., INC.

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Sunkist Growers, Inc. hereby petitions for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit entered in this case, November 21, 1966.

Opinions Below.

The majority and dissenting opinions of the Court of Appeals are reported at 369 F. 2d 449 (1966). Said opinions are attached hereto as Appendix A. The opinion which the District Court rendered in granting a directed verdict is unreported. Said opinion is attached hereto as Appendix B.

Jurisdiction.

The decision of the Court of Appeals for the Ninth Circuit in this case was rendered on November 21, 1966. Petitions for rehearing within the time allowed

therefor by rule of the Court, were filed by Case-Swayne Co., Inc. on December 16, 1966, and by Sunkist Growers, Inc. on December 22, 1966. Both of said petitions were denied by the Court of Appeals on January 12, 1967. An application for an extension of time in which to file this petition was filed with the Clerk of this Court on April 11, 1967, and was granted by Mr. Justice Douglas on April 12, 1967, extending the time in which to file this petition to and including May 1, 1967. The jurisdiction of the Supreme Court is invoked under the provisions of 28 U.S.C. §2101(c), and the provisions of Rule 22.4 of the Revised Rules of the Supreme Court of the United States.

Questions Presented for Review.

1. May product oranges produced in California and Arizona be a relevant market for purposes of determining the possible existence of a monopoly under §2 of the Sherman Act where (a) product oranges have value only because they can be processed into products which are sold in a national products market; (b) California and Arizona produce only approximately 10% of the product oranges, the products from which are marketed in such national market; and (c) the price at which product oranges may be sold in California and Arizona is limited by the national products market?

2. Under such circumstances, what are the tests for determining the relevant market under §2 of the Sherman Act where a derivative market is involved?

3. Can different tests be used to define a submarket which is proposed as the relevant market in a monopoly case so as to produce a market which is so narrow that it is not subject to monopolization?

4. Are the criteria for determining relevant market under §7 of the Clayton Act necessarily the same as those under §2 of the Sherman Act?

Statutes Involved.

This case is based upon alleged violations of §2 of the Sherman Act, and is maintained under the provisions of §4 of the Clayton Act. Those statutes are as follows:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding Fifty Thousand Dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the Court." (15 U.S.C. §2.)
>
> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." (15 U.S.C. §15.)

The exemption from the antitrust laws for the organization of agricultural cooperatives on which Sunkist relies is found in §1 of the Capper-Volstead Act, which provides in relevant part as follows:

> "Persons engaged in the production of agricultural products as . . . fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes; *Provided, however,* That such associations are operated for the mutual benefit of the members thereof, as such producers. . . ." (7 U.S.C. §291.)

Statement of the Case.

The jurisdiction of the District Court was based on §2 of the Sherman Act and §4 of the Clayton Act (15 U.S.C. §2, and §15.)

It is the plaintiff's claim in this case that Sunkist has monopolized and attempted to monopolize product oranges grown in California and Arizona. Product oranges are those oranges which cannot be sold as fresh fruit directly to the consumer, and they are therefore manufactured into various orange products.

The District Court held that there was no evidence which would support a finding that product oranges grown in California and Arizona constituted a relevant market, but that, on the contrary, the relevant market was national. Sunkist had only about 7% of the market,

and therefore could not have monopoly power. The Court granted Sunkist's motion for a directed verdict at the close of the plaintiff's case. The evidence on which the present petition is based is therefore limited to the evidence produced by witnesses called by the plaintiff. Sunkist has not put on its defense.

The Court of Appeals held that product oranges grown in California and Arizona might constitute a relevant market or submarket, and that the jury might find that Sunkist possessed monopoly power in this area. This petition questions the validity of that holding.

The plaintiff manufactures canned, single strength orange juice and orange-grapefruit juice blends from product oranges grown in California and Arizona. The manufacture of such juices, however, is only one of the many products for which the plaintiff uses its canning and packing facilities.

Other manufacturers use product oranges for different purposes. Many of them produce frozen concentrated orange juice. Sunkist manufactures orange products, including juices, concentrates, blends, juice bases, oil, pectin, pharmaceuticals, and cattle feed (ground up pulp), except that Sunkist has not produced canned single strength orange juice in competition with the plaintiff since 1956.*

The Sunkist System is a federated agricultural cooperative engaged in the processing and marketing of citrus fruits grown in California and Arizona. In its basic marketing agreement it undertakes to market all of

*The years involved in this lawsuit are the crop years from 1954-55 to 1961-62.

the citrus fruit of its grower members. This normally includes the picking, washing, sorting, grading and packing of the fruit, the making of the necessary arrangements for shipment to market, and the marketing of the fruit in local, national and international commerce. With respect to product oranges, the Orange Products division of Sunkist maintains extensive facilities for processing these oranges into a wide variety of orange products. It also handles the sales to commercial processors, such as the plaintiff of those oranges it does not process.

Sunkist has no shareholders, and it is not a profit making corporation. All proceeds from its operations, after the payment of costs, are ultimately returned to the grower. Both the District Court and the Court of Appeals held that Sunkist was qualified under the Capper-Volstead Act (7 U.S.C. §291); as such, it is authorized to engage in the collective "processing, preparing for market, handling and marketing" of the fruit of its grower members.

Oranges are grown in four producing areas in the United States. These are California, Arizona, Texas and Florida. The production of oranges in Florida far exceeds that of all of the other producing areas in the United States combined. During the years involved in this lawsuit, Florida produced an average of 73,200,000 boxes of product oranges per year. California and Arizona, on the other hand, produced an average of 8,500,000 boxes of product oranges per year. As a result of this great disparity in production figures, all of the witnesses expressed the view that market conditions in Florida exerted a decisive effect upon the price of product oranges throughout the country. This view was forcefully stated by Mr. Robert McCracken, the

president of Treesweet Products Company, a company which manufactured orange products in both California and Florida:

> ". . . the United States has a total number of boxes of oranges available. Your economics for the crop, the value of the crop, must follow the total supply of oranges. If there is a few, the prices go up, and if there are many, the prices go down.
>
> The Court: In other words, it is one national market and what happens in California affects Florida, and what happens in Florida affects California prices, isn't that true?
>
> The Witness: Yes, this is correct.
>
> By Mr. Beardsley: Q. And isn't it true that Florida is the dominant factor because, for example, I suggest to you that in the year 1959-1960, California-Arizona produced 32.3 million boxes out of a total of 129.6 million boxes of the total of the United States? A. Yes." [Rep. Tr. p. 253, line 16, to p. 254, line 7.]

All of plaintiff's witnesses who testified on this point agreed with this view. However, the reason that Florida dominates the market in California is not that Forida oranges can economically be shipped to California, for the plaintiff's evidence showed that this could not be done. The evidence did show, however, that Florida orange products are sold in California in direct competition with orange products manufactured in California.

Product oranges have no value except to the extent that they can be manufactured into orange products. If the demand for orange products declines, the demand

for product oranges will likewise decline. The price of product oranges in California and Arizona is therefore closely related to the supply of product oranges in Florida, and in fact throughout the country.

The plaintiff and the Court of Appeals, however, apparently felt that the convenience and availability of product oranges to plaintiff was a key test here. The Court of Appeals said

> "It seems clear from the decided cases that (1) while the outer limits of the market may be determined by the competition of interchangeable products, (2) there may be a well defined submarket which constitutes the relevant market for antitrust purposes, which (3) must correspond to the commercial realities of the industry, (4) is affected by price disadvantages due to transportation costs, (5) is affected by availability of a buyer to supply and existence of economic areas which significantly impede competition, (6) is determined in part with relation to the parties affected in the suit, and (7) is a question of fact in the particular case." (369 F. 2d 449, 456.)

We believe that these tests are utterly inappropriate in a case such as this. The fact that buyers in California and Arizona cannot buy product oranges in Florida does not mean that the sellers of product oranges in California and Arizona are free to set their prices at any level they choose. The facts show the contrary is true. Thus, the tests used here by the Court of Appeals produced a "relevant market" which is not subject to monopoly power.

Even if the attention of the Court is focused exclusively upon the supply of oranges in California and Arizona, without regard to the demand side of the

market, there was no evidence that Sunkist possessed the power to control prices or exclude competition.

Sunkist has no control over the supply of oranges grown in California and Arizona. Sunkist does not grow oranges, and it has no control over the amount of oranges grown by its members. Nor does Sunkist have any indirect means of controlling the supply of oranges, such as control over sources of credit or of nursery stock, or of land or water. There was no evidence to indicate that producing acreage was unavailable, if the plaintiff had desired to purchase it, or that there were other types of entry barriers which would have prevented the plaintiff from producing its own oranges. Sunkist is obligated by the agreement with its members to sell, or process and sell, all oranges produced by its growers, regardless of the amount produced. [Ex. 1, para. 6.]

The evidence did indicate, of course, that Sunkist had the power to determine how its own members' product fruit should be marketed. In this connection, several courses of action were open. The product fruit could be sold to commercial processors, such as the plaintiff. To the extent permitted by the capacity of its processing facilities, such fruit could be processed into various orange products by Sunkist. (The evidence indicated that the returns to Sunkist's grower members were lower on the fruit it had to sell to commercial processors than on the fruit it was able to process in its own facilities. Compare Ex. 151 with Ex. 118.) Other methods of disposition were also available. However, the various distribution methods did not affect the total supply of oranges available in California and Arizona.

The Court of Appeals stated that Sunkist controlled approximately 67%* of the product oranges grown in California and Arizona.

The remaining product oranges in California and Arizona, approximately 35%, are completely outside the control of Sunkist. The Court of Appeals stated that approximately 18% of the product oranges grown in California and Arizona were controlled for their own use by other small cooperatives. There is nothing in the record, however, to indicate that the actions of these other cooperatives were influenced by the actions of Sunkist in any way.

On the basis of these facts, the Court of Appeals held that a jury could have found that the submarket of California and Arizona was the relevant market, and that Sunkist had monopoly power in that market. Petitioner asserts that both of those conclusions are unsound.

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*This figure is based on plaintiff's Exhibit 126, Plaintiff's Exhibit 92 showed that Sunkist's average control was 62.40% of the product oranges grown in California and Arizona; that its percentage never exceeded 65% and that in 1957-58, its percentage dropped to 54.69%. The percentage for each year involved in the lawsuit shown by plaintiff's Exhibit 92 is as follows:

Years	Sunkist percentage
1954-55	64.941%
1955-56	63.5945%
1956-57	60.729%
1957-58	54.6923%
1958-59	62.054%
1959-60	63.604%
1960-61	61.933%
1961-62	62.250%
Average	62.40%

THE REASONS FOR THE GRANT OF CERTIORARI.

I.

This Case Presents New Issues of Fact and Law in the Application of §2 of the Sherman Act.

1. This proceeding involves a derivative market (that is a market in which the entire demand for the product is derived from a second market). The unusual economic problems presented by this type of market have not previously been considered by this Court.

2. The Court of Appeals apparently declared that a relevant market for purposes of §2 of the Sherman Act may be divided into submarkets (a question which was left open by this Court in *United States v. Grinnell Corp.* (1966), 384 U.S. 563, 573), and that a submarket may be used as the relevant market to determine whether or not a monopoly exists, even though that submarket does not meet the tests laid down by this Court in *United States v. E. I. du Pont and Co.*, 351 U.S. 377. The *du Pont* case held that a relevant market for Sherman Act purposes must be a market which is sufficiently isolated so that it may be controlled by the defendant.

3. In defining the relevant market, the Court of Appeals applied many of the market definition tests used under §7 of the Clayton Act, without regard to the different standards of the Sherman Act. Thus, the Court focused on the market alternatives of the com-

mercial processors—which would be appropriate in a §7 case—rather than the market power of the defendant. In some cases this might make no difference; in this case, because of the derivative nature of the market, it makes a critical difference.

In short, this case presents an economic problem which we believe has not previously been considered by this Court; the Court of Appeals has applied mechanical tests designed for other types of markets which, when applied here, produced a "relevant" market which does not fit the commercial realities, and, because it is based on §7 submarket tests, is not subject to monopolization.

Since the commercial realities lie at the heart of this case, we believe that a detailed exposition of the undisputed facts is appropriate:

II.

The Plaintiff's Evidence Established the National Market in Product Oranges.

A. Florida Produces About 90% of the National Supply of Product Oranges.

The testimony shows that Florida produces about three times as many total oranges as California and Arizona combined. However, 75 to 85% of the Florida crop is manufactured into orange products while only about 15% of the California crop is used for orange products. Thus, the California-Arizona production of product oranges is on the average only about

10% of the total national production of product oranges, as shown by the following chart*:

Year	All oranges Produced in Florida	Florida Product Oranges 80% of First Column	Calif-Ariz Product Oranges	Calif-Ariz Percentage of Total
1954-5	88.4	70.7	11.9	14.4%
1955-6	91.0	72.8	11.1	13.3%
1956-7	93.0	74.4	9.6	11.4%
1957-8	82.5	66.0	3.9	5.6%
1958-9	86.0	68.8	11.1	13.9%
1959-60	91.5	73.2	8.6	10.5%
1960-1	86.7	69.4	6.0	8.0%
1961-2	113.4	90.7	5.6	5.8%
8-year Average	91.6	73.2	8.5	10.4%

Sunkist, of course, operates only in California and Arizona, and has an average of 63% or 67% of the product oranges there. Sunkist, therefore, has only about 7% of the national production of product oranges.

B. The Price of Product Oranges Throughout the Country Was Controlled by National Supply and Demand.

All of the witnesses who testified on this point agreed that the market price for product oranges was determined by the national supply and demand, and that Florida was the dominant factor.

The first witness called by the plaintiff was Mr. Robert McCracken, the President of TreeSweet Products Company. TreeSweet manufactures orange products in

*The above figures are stated in millions of boxes. The Florida orange production is shown in Exihibit 9, and the California-Arizona product orange production is shown in Exhibit 92. The figures relating to the production of Florida product orange are based on the testimony of Mr. Wendell McCracken, that 75 to 85% of the total Florida orange production was devoted to orange product uses.

both California and Florida, and so he was able to testify concerning the relationship between the two markets. He testified that:

> ". . . the United States has a total number of boxes of oranges available. Your economics for the crop, the value of the crop, must follow the total supply of oranges. If there is a few, the prices go up, and if there are many, the prices go down.
>
> The Court: In other words, it is one national market and what happens in California affects Florida, and what happens in Florida affects California prices, isn't that true?
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> The Witness: Yes, this is correct.
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> By Mr. Beardsley: Q. And isn't it true that Florida is the dominant factor because, for example, I suggest to you that in the year 1959-1960, California-Arizona produced 32.3 million boxes out of a total of 129.6 million boxes of the total of the United States? A. Yes." [Rep. Tr. p. 253, line 16, to p. 254, line 7.]

Morgan Ward, who had been engaged for many years in selling product oranges for a number of independent producers in California, testified as follows:

> "Q. [By Mr. Beardsley]: Is it not also true that during all of this time you gave considerable thought to the conditions in Florida, such as whether it was a short crop year or whether there was an abundance of Florida fruit, and what the prices of Florida products were in California, in arriving at the price which you placed on your product oranges which you sold in California?
>
> A. That is true.

Q. It is not true that you considered that *the principal factor affecting the prices in California, both Sunkists and everybody elses', the Florida influence—is that not true, sir?* A. *It is the principal factor over all the United States.*" [Emphasis added; Rep. Tr. p. 389, lines 10-23.]

Morgan Ward also testified as follows:

"Q. In other words, if there is a short crop in California, and consequently California prices for product fruit rise, this has some effect on prices throughout the country, does it not? [Objection, overruled.]

The Witness: I would say in a measure, yes. If you had a short crop in California, in a measure.

[By Mr. Beardsley]: Q. Let me take the converse situation. Suppose there is a freeze in Florida, as there was in, I think either '62 or '63, and a very short crop in Florida, does that not in great measure affect the price of California product oranges in that season? A. More so than California would have on Florida. It is like the big dog and the little dog." [Rep. Tr. p. 390, line 17, to p. 391, line 9.]

Mr. Robert McCracken of TreeSweet testified unequivocally to the same thing.

"Q. Have you found over the years that the quantity of Florida products fruit available has a direct bearing on both the prices, the prices of both products, the canned goods and the product oranges in California?' A. Yes.

Q. Isn't it actually the major factor that affects the price of both products and product oranges in California? Isn't the Florida production and price the major factor? A. Florida, by reason of the fact that it grows many more boxes of oranges than California, is the dominant economic factor, Yes." [Rep. Tr. p. 248, line 16, to p. 249, line 1.]

Morgan Ward testified as follows about the importance of Florida production:

"Q. Is it your opinion, then, that the market conditions with respect to Florida product oranges had more effect on the price of product oranges in California than any one factor? A. They have effect on the overall United States. . . .

Q. I am particularly interested now in your view about the importance of the Florida— A. I think it is of great importance." [Rep. Tr. p. 392, lines 2-17.]

Mr. Robert McCracken discussed the Florida freeze which took place in December, 1962.

"Q. How did that affect the prices in California? A. All citrus prices generally went up after the Florida freeze due to the scarcity of supplies." [Rep. Tr. p. 246, lines 7-9.]

Mr. McCracken went on to testify as follows:

"Q. My question to you, does that sort of shortage resulting from an unnatural condition, a condition of freeze, the freeze in Florida, affect the price at which you could sell your California products? A. Yes, Sir, it would have an effect." [Rep. Tr. p. 247, lines 2-6.]

Mr. McCracken also testified as follows:

"The Court: You said it would affect the market. You were talking about the retail market. Now, would it [a freeze] affect the market concerning the supply of surplus fruit in California?

The Witness: Yes, generally, it would.

Q. [By Mr. Beardsley]: What effect would it have? A. It would generally raise it.

Q. Have you found over the years that the quantity of Florida products fruit available has a direct bearing on both the prices, the prices of both products, the canned goods and the product oranges in California? A. Yes." [Rep. Tr. p. 248, lines 3-20.]

C. Products Produced in Florida Compete Directly With Those Produced in California.

Moreover, the evidence showed that these California-Arizona oranges were in direct competition with Florida oranges for the consumer dollar in California. For example, Robert McCracken, the president of TreeSweet, testified that they shipped 45 to 50% of their Florida juice to the West Coast, mostly to California. [Rep. Tr. p. 268, lines 16-21.]

Other manufacturers also sold Florida juice in California.

"Q. Do other brands of Florida single strength juice find their way into the market here in the West? A. Oh, yes. . . .

Q. What other brands are there from Florida? A. The better known ones would be Del Monte, Libby, Stokeley." [Rep. Tr. p. 119, lines 3-10.]

Mr. Robert McCracken also testified that the California and Florida products could not be separated from a competitive point of view.

> "Q. Does Del Monte pack California single strength juice? A. Florida.
>
> Q. I was talking about the leader in the price in California single strength juice. A. You can't separate the two as long as Del Monte and Tree-Sweet are in the market, on the shelf, whether it is Florida or California. We both sell to the consumer in Los Angeles." [Rep. Tr. p. 294, lines 4-12.]

He had testified to the same fact earlier in the trial.

> "Q. [By Mr. Harmon] It is competitive—I don't mean particularly pricewise, although that is also an element—with single strength juice packed in Florida? [Objection, overruled.]
>
> The Witness: Of course the two products do compete pricewise, the two products are sold off the same grocery shelves in California." [Rep. Tr. p. 88, line 12, to p. 89, line 6.]

Mr. Amos Swayne, President of the Appellant corporation, confirmed the competition between California and Florida products. In answer to questioning by Mr. Henderson, he testified as follows:

> "Q. Now is Florida canned single strength orange juice sold in California and the Western states? A. Yes.
>
> Q. Can you name some of the brands? A. Del Monte, Stokeley, Libby—those are national brands of Florida orange juice that are sold in this market and other markets throughout the country.

Q. Is this plaintiff's Exhibit No. 125 [a can of plaintiff's single strength orange juice] the orange juice that is sold in competition with brands you mentioned on the shelves of the grocers? A. Yes, it is." [Rep. Tr. p. 487, lines 15-25.]

Not only could Florida juice be sold in California in direct competition with California juice, but the Florida manufacturers were able to undersell California manufacturers in the California market.

"Q. So, in spite of the fact that you and other Florida producers pay this high cost [81¢ per case] to bring your products to California, it still can be sold for less than the California juice, can it not? A. This is generally true." [Rep. Tr. p. 270, lines 10-14.]

The effect of Florida production on California prices is dramatically illustrated by market conditions in 1957. The plaintiff started 1957 with a price of $3.80 per case. In February its prices were raised to $4.00 per case. On March 28, 1957, Paul Case wrote the following memorandum to Amos Swayne:

"Bob McCracken [Sales Manager of Tree-Sweet] says market broke in Florida this last weekend. Orange juice sales down 19%—pack up."

By Mr. Beardsley:

Q. Pardon me. What does he mean by 'pack up'? A. Pack increase. A large pack.

Q. More Florida juice was coming on the market? A. Apparently.

Q. Sales were down 19 per cent; right? A. Yes, right.

. . .

"Q. Just going back, Pasco is a Florida juice, is it not? A. It is, yes.

Q. And its price was 2.45 for the same case which you were then selling for $4.00, is that right, or delivered in California at 3.23? A. That's correct.

Q. The same case you were then selling for $4.00? A. That's correct.

Q. So you recommended to Amos Swayne— A. Yes.

Q. —That your current price be reduced from $4.00 to $3.70? A. That's right." [Rep. Tr. p. 888, line 21, to p. 891, line 14.]

On March 29, 1957 Paul Case wrote to Mr. John Tiedemann, a jobber of Case-Swayne products in Northern California:

"Dear John:

Amos and I have gone over the current Florida situation and have adjusted our prices as much as we can do so. The price cuts are very severe, based on our present costs and we will be taking a loss, but will go along on the following basis for the present." [Rep. Tr. p. 897, lines 14-21.]

On April 5, 1957 Paul Case wrote the following letter to Mr. Markowitz:

"Dear Harry:

In consideration of the lower Florida prices, we are pleased to revise your prices to the following . . . ." [Rep. Tr. p. 894, lines 20-23.]

Mr. Case testified that they had in fact lowered their prices because of the Florida competition.

> "You did make a change in your product prices due to the Florida prices in April, 1957, did you not? A. Quite apparently, Yes." [Rep. Tr. p. 895, lines 1-3.]

On May 6, 1957 Paul Case wrote the following memo to Case-Swayne:

> "Talked to Bob Boheim, Treesweet, Friday morning and he said that they received word Friday that Pasco had reduced the prices of orange concentrate from $1.25 to $1.00 per dozen. He said that independent packers were losing money on the price of $1.35 per dozen and that somebody is liable to go bust. He also said that so far there have been very few Valencias harvested due primarily to the market conditions. With this situation developing, the growers will have to reduce their prices appreciably before there will be any volume pack. This no doubt means that single strength orange juice will be selling on a much lower level than it is today." [Rep. Tr. p. 904, lines 8-22.]

Mr. Case testified that the plaintiff had again reduced its prices in May, 1957:

> ". . . we gave much less weight to the price of concentrate than we did to other factors, including the price of single strength orange juice in Florida." [Rep. Tr. p. 905, line 23, to p. 906, line 1.]

There was no improvement in the Florida production picture in June.

"Ade McNamara says the Florida market is very sloppy. Many oranges are going on the ground in Florida and they think the early pack of sweetened orange juice has killed the hot pack [canned single strength] business." [Rep. Tr. p. 913, lines 19-23.]

D. Florida Production Costs Were Lower.

One of the reasons for the effective competition from Florida products was that the cost of producing oranges in Florida is less than in California:

"By Mr. Beardsley: Q. I intended to ask whether all of these costs, land, taxes, less irrigation, higher cost of labor to cultivate, higher cost of labor to pack, higher cost of labor to wash, process, can and so on, I took all of those things into consideration, and in each one of those the cost was lower in Florida than in California. A. Right.

Q. The first part of which, land, water, taxes, cultivating, picking, go into what fixes the cost of the fruit, is that correct? A. That is correct." [Rep. Tr. p. 274, lines 7-17.]

E. The Price a Processor Can Pay for California Product Oranges Is Limited by the National Product Market.

Thus, the evidence in this case showed beyond any reasonable doubt that the price which could be obtained for oranges by the grower depended upon national market conditions. Even the president of the plaintiff corporation testified that this was correct. In 1956 and

1957 Sunkist sold product oranges on a bid basis. All commercial processors, including the plaintiff, were invited to bid. The plaintiff submitted bids on the first two lots of oranges offered for sale, but did not bid on lot No. 3:

> "The reason we did not make a bid on this particular bid, on offer No. 3, was that the prices under the bid system wre continuing to go up and we made evaluations at that time, *based on the supplies of fruit in Florida* and the prices at which the bids were going, and it was our decision at that time to make [no] further bids—or to bid on this bid at higher prices would be highly speculative on our part." (Emphasis added.) [Rep. Tr. p. 579, lines 17-24.]

Any purchaser of product oranges had to follow the same procedure. He had to determine what price he could get for his orange products in the national market. That market was dominated by Florida production. If he could buy oranges at a price which permitted his products to compete with Florida production, he would buy. But if he could not buy oranges at that price, he did not buy.

Sunkist, and the other sellers of product oranges in California and Arizona could therefore not raise their prices above that regulated by the national market. If they did, the sales stopped and they had unsalable oranges.

F. The Record Would Not Support a Finding That Sunkist Controlled the Price of Product Oranges in California and Arizona.

The only testimony in the record designated to show that Sunkist controlled prices of product oranges in California was that of Morgan Ward in one answer. He had already testified (as quoted in emphasis, paragraph IIB above) that Florida production was the principal factor determining California prices including Sunkist's prices and had compared Florida and California as the "big dog and the little dog" He was then asked:

"By Mr. Beardsley:

"Q. Is it your opinion, then, that the market conditions with respect to Florida product oranges, have more effect on the price of product oranges in California than any other one factor? A. They have effect on the overall United States. Then those who set prices on the fruit in California look at what is going on all over the United States, and at that time the prices were set in California by the leading growers, Sunkist set it, using all those things to do it, I assume. But the price of byproducts in this State has, ever since I have been in the business since 1934, been set by Sunkist. At one time it was called California Fruit Growers Exchange, and Sunkist at this time." [Rep. Tr. p. 392, lines 1-14.]

The clear meaning of this testimony is that Sunkist set the price within the guidelines of the national market. Sunkist's price was not the controlling factor; it was, as this witness pointed out, controlled by national supply and demand.

III.

The Basic Test of Monopoly Is the Power to Control Price and Eliminate Competition.

A. The Case Law Has Consistently Recognized This Test.

Section 2 of the Sherman Act is intended to prohibit the possible exploitation of the market for the unfair or unreasonable aims of the claimed monopolist. The courts have consistently laid down the basic test to determine whether or not a monopoly exists: Does the claimed monopolist have the power to control the price or to eliminate competition? Regardless of the technique used to reach a conclusion, if the claimed monopolist has that power, he has a monopoly; if he does not have that power, he does not have a monopoly.

The Court of Appeals, of course, was well aware of this general test for monopoly power, and stated the rules as follows:

> "The cases uniformly hold that 'a party has monopoly power if it has, over "any part of the trade or commerce among the several states", a power of controlling prices or unreasonably restricting competition'. *United States v. E. I. du Pont de Nemours & Co.*, 1956, 351 U.S. 377, 389. . . ."

B. A Market Is Not Subject to Monopoly Unless It Is Sufficiently Isolated From Other Commerce That Prices Can Be Controlled or Competition Eliminated.

A necessary corollary to the basic test for monopoly is that a market may not be monopolized unless the powers of monopoly can be generated. Many markets are not subject to monopoly, because they are not subject to control for various reasons.

1. *Geography.* A market cannot be monopolized if it is not sufficiently isolated in space. As an example, control of the entire egg supply of the District of Columbia would not give any monopoly power because if prices were raised, eggs would immediately be shipped in from the surrounding area. No degree of control in such an area will give power over price.

2. *Products.* A market cannot be monopolized unless it includes all of the products for which there is high cross-elasticity of demand or supply. If products A and B are substitutes, raising the price of A will be ineffective because customers will purchase product B. The proposed monopolist must control all of the products which compete to generate monopoly power. No degree of control over product A will give control over price.

3. *Derivative markets.* Whether or not a market may be subject to monopoly may also depend upon whether it is a primary or a derivative market. A derivative market is a market for materials which have no immediate value to the consumer, but which may be processed and sold to the ultimate consumer.

The market for product oranges is a derivative market. Product oranges have no value *per se.* (They are product oranges because they cannot be sold as fresh oranges.) They have value only because they may be processed into orange products, and may then be sold in the *products* market.

The price of product oranges therefore must be a reflected price, dependent upon the price which can be obtained for the products. The supply and demand for orange products will determine the price of orange products. The price which can be obtained for product oranges will therefore be limited to the price which will enable a person to pay for the oranges, process them, and sell the products in the products market.

Depending on the facts of the particular market, control of a substantial part or even all of the goods sold in a derivative market may give no monopoly power at all. The price is limited by the products market and no degree of control will give power over price. In each case the test must be: Does the claimed monopolist have the power to control the price or eliminate competition?

4. *Other factors.* There are, of course, many other facts which affect whether or not a monopoly exists. Many agricultural products, for example, raise special problems because the immediate supply depends on weather, climate, and other factors outside of anyone's immediate control.

But there can be no escape from the conclusion that some markets may be monopolized and others may not. *The market must be sufficiently isolated and free from outside limitations before it can be monopolized.*

These considerations have led to the development of the concept of relevant market as a tool in determining whether or not a monopoly exists.

IV.

The Concept of "Relevant Market" Is Only a Tool in Determining the Possible Existence of a Monopoly.

Although the basic tests for monopoly do not require a determination of the relevant market, courts have found the determination of the relevant market helpful in evaluating the economic power of the claimed monopolist.

A. Relevant Market Approach.

A technique which has been developed in many cases is to define the market in which the products involved actually compete. By considering cross-elasticity of demand, actual competition, suitable substitutes, and dozens of other factors, the courts have generally been able to determine an effective market in terms of product, space, and time within which the particular product involved competes. The relevant market, however, must be a market subject to monopoly. If the market is too narrowly restricted by product, geography or otherwise, it will not be subject to monopoly.

Once the relevant market has been defined, the courts have next examined the share of that market controlled by the alleged monopolist. Attempts have been made to create a rough scale to get an idea as to whether or not a monopoly may exist. For example, in *United States v. Aluminum Company of America,* 148 F. 2d 416, 424, Judge Learned Hand observed, after having defined the relevant market, that "That percentage [90%] is enough to constitute a monopoly; it is doubtful whether 60 or 64% would be enough; and certainly 33% is not."

B. United States v. Du Pont Illustrates the Relationship of Relevant Market to Monopoly.

The *du Pont* case, 351 U.S. 377, wrestled with the problem of relevant market. After laying down the basic tests for monopoly (control of price, elimination of competition) the Court searched for the relevant market. *Du Pont* produced about 75% of the cellophane in the United States. If cellophane were the relevant market, du Pont might have a monopoly; if all flexible wrapping materials constituted the relevant market, its percentage was small, and it could not have a monopoly.

The argument in that case (and the division between the majority and minority) was not over the principles just stated, but on the question as to what constituted the relevant market. The majority concluded that du Pont did not have power to fix prices and eliminate competition in cellophane because of the competition from other wrapping materials. Therefore, the relevant market was held to be all flexible wrapping materials. The minority felt that du Pont had the power to set the price of cellophane and therefore cellophane was the relevant market. (See 351 U.S. 377, 422.) But all agreed on the key test: did du Pont have the power to control the price.

C. The Relevant Market Approach Is Not a Substitute for the Basic Tests.

Relevant market is a helpful tool in evaluating a claimed monopoly, but it must conform to the economic realities. If the market defined is not sufficiently broad

so that it can be subject to monopoly, the approach is valueless. The relevant market is simply a tool for analysis; it is not a substitute for analysis.* Thus, the definition of any relevant market can and must be tested by applying the criteria of control of price or elimination of competition.

To put it another way, if the Court had tentatively reached the conclusion in the *du Pont* case that cellophane was a relevant market, and had then applied the ultimate test as to whether or not controlling substantially all of the cellophane production would permit du Pont to raise prices unreasonably, the Court would have observed that the prices still could not be controlled because of competing products. Therefore, on these facts, a relevant market consisting only of cellophane would have been artificial, because it is not a segment of commerce sufficiently isolated to permit monopolization.

The purpose, therefore, of defining relevant market is to try to determine on area of competition which is sufficiently isolated to enable the alleged monopolist to control the price or eliminate competition. If we make an error in restricting the relevant market, to a segment which is not really isolated, then control of that market can have no real economic effect constituting a monopoly.

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*Compare the situation in *United States v. Pabst Brewing Co.*, 384 U.S. 546 (1966), where the District Court held that no relevant market existed, and that the merger involved could not violate §7 of the Clayton Act. This Court, in reversing, held that the decisive question was whether the merger did in fact tend to lessen competition, and that tests relating to the relevant market could not be substituted for the tests prescribed by the statute.

V.

The Relevant Market Concept Applied to Section 2 of the Sherman Act Is Not Necessarily the Same as the Concept Applied to Section 7 of the Clayton Act.

1. Sherman Act.

Section 2 of the Sherman Act prohibits a monopoly of "any part of the trade or commerce among the several states or with foreign nations. . . ." (15 U.S.C. 2.) The concept of relevant market is material only to determine whether or not the alleged monopolist has the necessary power to exploit the market and therefore to monopolize the product. It is not discussed in the statute.

2. Clayton Act.

The test under §7 of the Clayton Act is quite different. It provides that there shall be no acquisition of a business or interest in a business "where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." (15 U.S.C. §18.)

In dealing with the concept of a monpoly, the entire "relevant market" must be treated, because it is only by controlling the entire relevant market that monopoly power may be created. However, under the Clayton Act, monopoly power need not exist; the acquisition needs only "substantially to lessen competition." Thus, whether or not it creates a monopoly or even tends to create a monopoly, the acquisition is prohibited if it lessens competition.

Furthermore, the section itself clearly contemplates submarkets: it deals with "any line of commerce" and

in "any section of the country." There is no requirement that any such part of a line of commerce be subject to monopoly.

3. Contrast.

On reflection, therefore, the "relevant market" referred to in the Clayton Act cases may or may not be the relevant market material in the Sherman Act cases. The requirements are less in the Clayton Act, and therefore the market may be divided, and submarkets dealt with, where it would be inappropriate under the Sherman Act.

Placed in the context of the *du Pont* case, the difference becomes readily apparent. In that case du Pont controlled about 75% of the cellophane production and Sylvania controlled the other 25%. It is apparent that if these two corporations merged, they would not necessarily obtain a monoply, because this Court has already told us that the power to control the cellophane market is limited by competition from other wrapping materials. However, can there be any question that such a merger would "substantially lessen competition"?

The result, therefore, is that the market definition question is not a critical question under §7 of the Clayton Act. Even in exploring the possible liability created where the acquisition "tends to create a monopoly", the definition of relevant market need not be one which includes all of the products which potentially compete. Cornering all of the cellophane market might well "tend to create a monopoly" if cellophane is a substantial part of the flexible wrapping materials market, even though controlling all of the cellophane does not constitute a monopoly.

VI.

The Court of Appeals Incorrectly Applied the Concept of Relevant Market to This Case.

A. The Court of Appeals Incorrectly Applied the Submarkets Rule of the Clayton Act Cases to This Case Under the Sherman Act.

The Court of Appeals apparently reached the conclusion that after a relevant market is determined as in the *du Pont* case, it may be possible to break it down into submarkets for consideration of §2 of the Sherman Act.

> "It seems clear from the decided cases that (1) while the outer limits of the market may be determined by the competition of interchangeable products, (2) there may be a well-defined submarket which constitutes the relevant market for antitrust purposes. . . ." (369 F. 2d 449, 456.)

The Court speaks of various tests, but not the *du Pont* tests. In a monopoly case, the object is to determine a market which is subject to monopoly. These tests cannot then be ignored in breaking the market up into smaller fractions, or the whole object of defining the relevant market is lost.

Reliance was placed on two passages from *United States v. Grinnell,* 384 U.S. 536 (369 F. 2d at 454 and 455). Those passages do not equate relevant markets under the two statutes. Neither *Grinnell* nor any other authority with which petitioner is familiar does that.

The new doctrine now laid down is that the initial relevant market should be defined in the *du Pont* tradi-

tion. But once the overall market is defined, the Court will apparently permit a segment of the relevant market to be used, based on other considerations. That may or may not be appropriate under the Clayton Act, but clearly does not provide an appropriate test for monopoly power.

The du Pont tests must be applicable to the market actually used, not to one postulated and then subdivided.

B. The Court of Appeals Failed to Apply the Fundamental Rules to Test the Possible Relevant Market.

Nowhere does the Court of Appeals consider whether or not Sunkist might be able to control the price of or eliminate competition in product oranges in the California-Arizona submarket.*

The Court of Appeals applied its relevant market approach mechanically without regard to the economic effects. It recognized that there could be a national market in product oranges; on considerations short of those required to establish a relevant market for §2 of the Sherman Act, it concluded that California and Arizona could constitute a submarket.

This test failed to determine what is really sought here: Could Sunkist control the price or eliminate competition?

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*The only reference in this regard is to the testimony of Morgan Ward regarding Sunkist's setting the price in California. However, as shown in the discussion of the facts before the Court of Appeals, his statement was that Sunkist set the price within the framework of the national market, based on national supply and demand. That testimony is discussed in section II F hereof.

VII.

The Inability of Plaintiff to Buy Product Oranges in Florida and Ship Them to California for Processing Does Not Change the Rules of Liability Under Section 2 of the Sherman Act.

The argument of plaintiff and, indeed, the basis primarily relied upon in the Court of Appeals is not a consideration of the economic power of Sunkist to develop or exploit the sale of product oranges, but quite to the contrary, it is a consideration of the fact that the particular plaintiff here involved cannot economically buy product oranges which are available for sale in Florida and ship them to California for processing. The Court of Appeals further points out that this particular plaintiff is unable to buy oranges from any other growers in California (not due in anyway to Sunkist activity) and has not been able to buy oranges from Sunkist. Because of what is asserted as the practical inability to buy fruit elsewhere, and therefore to compete in the product market, the Court of Appeals reaches the conclusion that a jury might have concluded that California and Arizona constitute a relevant market.

It is apparent that if a relevant market may be established solely on the grounds of convenience of a particular business entity, the basic idea underlying the definition of a monopoly has been changed. Relevant market would then not be defined in terms of the power of a particular business enterprise to exploit a particular market. Of course, any transaction by one competitor limits, in some way, transactions of another. The latter situation in no way implies monopolistic powers.

Plaintiff's argument overlooks the fact that Sunkist had at best only 67% of the product oranges in California and Arizona. Therefore, 33% of the oranges were not subject to Sunkist's control in any way. Why should Sunkist be responsible because these other producers did not sell to plaintiff?

Plaintiff has started from the single fact that it has been unable to buy oranges at prices which it wishes to pay, and from the premise reaches the conclusion that Sunkist is responsible for it, simply because Sunkist has a lafger share of the market than anyone else. However, those other parties are in an equivalent position to Sunkist's, because they also could have supplied plaintiff.

A careful examination of the facts now before the Court shows clearly that plaintiff has not been excluded from competition by Sunkist and that there is no economic significance to the plaintiff's inability to purchase oranges in Florida and ship them to California at prices which would permit competition in the national products market.

A. Plaintiff Has Not Been Excluded From Competing in the Orange Products Market.

Plaintiff desires to purchase product oranges solely for the purpose of manufacturing and selling canned single strength orange juice. The incontestable facts, as accepted by the Court of Appeals, established that that market is a national market. The record also clearly shows that there are a number of ways in which the plaintiff can continue to participate in that competitive market:

(a) So far as Sunkist is concerned, plaintiff can buy any of the product oranges in California and Arizona which do not come into the Sunkist System. If those oranges are not available to plaintiff, it is because of factors entirely outside of Sunkist's control.

(b) The plaintiff can purchase oranges in Florida, process them in Florida, and sell them in the national market.

(c) The plaintiff can buy juice from Florida oranges, ship it to California, and can process it in California for sale in the national market.

(d) The plaintiff could have purchased canned single strength juice, custom packed in Florida, and marketed it under its own label.

(e) The plaintiff can buy juice in California and can it and market it under its own label. (For plaintiff's purposes, such juice is interchangeable with product oranges.)

(f) The plaintiff can directly approach the growers in the Sunkist System, and seek to purchase oranges from them. As the facts show, the growers may terminate their contracts with Sunkist and sell their oranges to plaintiff or anyone else.

(g) The plaintiff can bid on the product oranges which are put up for sale by Sunkist.

It is therefore apparent that plaintiff has not been excluded from participating in the products market as a seller. Plaintiff apparently asserts that it is excluded from the product orange market as a buyer. Such assertion is also not true.

B. Plaintiff Has Not Been Excluded From the Product Orange Market.

There are a number of ways in which plaintiff can obtain product oranges if he wishes to do so.

(a) Sunkist in no way affects the right of plaintiff to acquire the 33% of product oranges in California and Arizona which do not come in to the Sunkist System. If plaintiff does not obtain those oranges, it is because of factors entirely out of the control of Sunkist. Those oranges would be more than adequate to take care of plaintiff's requirements.

(b) Plaintiff can purchase product oranges in Florida. It insists that it does not want to do this, that is its election not to do so.

(c) Plaintiff can seek to acquire oranges from Sunkist growers.

(d) Plaintiff can bid on the product oranges which Sunkist puts up for sale.

(e) Plaintiff can always acquire producing acreage or plant and grow its own oranges if it wishes to have an assured supply.

C. The Effect of Sunkist's Activities Upon Plaintiff Are Not Legally or Economically Significant.

A careful analysis of the limitations which might be placed upon plaintiff's business by Sunkist's activities then may be stated accurately as follows: Plaintiff is limited only in that it cannot be assured of getting approximately 65% of the supply of product oranges in California and Arizona for the purposes of actually processing them in its plant and selling the products which result therefrom. Even this statement is subject to the exception that it may be able to buy some of

those oranges which are put up for sale, if it bids for them.

But even as to the products from these oranges, it can buy chilled juice and still can and market that juice under its own label. In the end result, therefore, it has been limited only in the initial process of squeezing the orange juice from the product oranges to the extent that Sunkist elects to do so with the product oranges it has in its system. That limitation, we submit, is not legally or economically significant. It clearly does not supply the basis for the definition of a relevant market which would establish Sunkist as a monopolist. It clearly does not affect the price at which product oranges or orange products are sold in California and Arizona or elsewhere in the United States. It does not enable Sunkist to make any kind of an unreasonable or exorbitant profit, or in any other way to exploit the market in product oranges or orange products. And it is entirely justifiable because Sunkist, as any other business organization, is entitled to process the fruit within its own organization, and help minimize the overhead on its processing facilities. Not only could an ordinary business corporation do this, but Sunkist has a particular right to do so because its qualification as a Capper-Volstead cooperative expressly permits it to process its own fruit and prepare it for market.

We therefore conclude that Sunkist's activity in determining to process its own fruit, and not offer it for sale to other potential purchasers, is an ordinary business activity which any organization may pursue and that further, it is not a factor which demonstrates or would even justify a jury in finding that the relevant market here is limited to California and Arizona.

Conclusion.

It is therefore respectfully submitted that a writ of certiorari should be granted in this case.

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